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IN THE  
**Supreme Court of the United States** RODAK, JR., CLERK

OCTOBER TERM, 1977

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**No. 77-962**

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HAWAIIAN TELEPHONE COMPANY

and

HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES  
and CHAMBER OF COMMERCE OF HAWAII,*Joint Petitioners,*

v.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,  
ROBERT K. HASEGAWA, THOMAS S. BROWN,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1357 INTER-  
NATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1260, and HAWAII  
STATE FEDERATION OF LABOR, AFL-CIO,*Respondents.*

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**JOINT PETITIONERS' REPLY BRIEF**

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*Respondents.*

**JOINT PETITIONERS' REPLY BRIEF**

Respondents predicate their opposition to this joint petition upon the narrow and tenuous ground that this

Court's summary disposition of an appeal from an unreported, summary decision of the New Mexico Supreme Court in *Kimbell* represents the Supreme Court's final word upon this important issue. A summary disposition, be it affirmance or dismissal of an appeal, is not of the same precedential value as an opinion of this Court on the merits, *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974), *Tully v. Griffin, Inc.*, 97 S.Ct. 219, 223 (1976), and "does not, of course, foreclose this opportunity to consider more fully [the] question." *Massachusetts Board of Retirement v. Murgia*, 96 S.Ct. 2562, 2654, n. 1. Neither the record, the jurisdictional statement, nor the motion to dismiss the appeal in *Kimbell* squarely presented to this court the question of whether Congress has condoned employer support of strikers and the consequent alteration of relative bargaining strength. Respondents' view of *Kimbell* is not shared by the Second Circuit or the District Courts in Hawaii, Michigan and New York, each of which has concluded that this Court's dismissal in *Kimbell* does not respond to or resolve the preemption issue as it is presented here.\* In *New York Telephone*, the

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\* *New York Telephone Co. v. New York State Department of Labor*, 556 F.2d 388 (2nd Cir., 1977) [petition for certiorari pending in No. 77-761]; *Hawaii Employers Council v. State of Hawaii Dep't of Labor & Indus. Rel. (Pearl Harbor Fed. Credit Union)*, Civil No. 74-262 (D. Hawaii July 5, 1977) (appeal filed 9th Cir.); *Dow Chem. Co. v. Taylor*, 428 F. Supp. 86 (E.D. Mich. 1977), certified to 6th Cir. (E.D. Mich. May 19, 1977) (No. 77-8064); *American Broadcasting Cos. v. New York State Dep't of Labor*, 77 Civ. 2995 (S.D. N.Y. June 30, 1977). Following his decision in *Hawaiian Telephone*, U. S. District Court Judge Martin Pence, in ruling on motions for summary judgment in other, pending consolidated cases stated that nothing in *Kimbell* or *Super Tire* would cause him to change the opinion he rendered in the instant case. *Philco-Ford Corp. v. State of Hawaii Dept. of Labor and Industrial Relations*, No. 75-44; *Mailwell Envelope Co. of Hawaii, Inc. v. State of Hawaii Dept. of Labor and Industrial Relations*, No. 75-131 (D. Hawaii, July 5, 1977).

Second Circuit considered whether the summary dismissal of *Kimbell* was controlling:

In *Kimbell, Inc. v. Employment Security Commission of New Mexico*, 429 U.S. 804 (1976), the Supreme Court dismissed, for want of a substantial question, an appeal which raised, *inter alia*, the question at issue here. [Citations omitted.] We must therefore decide whether, under the doctrine of *Hicks v. Miranda*, 422 U.S. 332 (1975), the *Kimbell* dismissal is controlling. [Citations omitted.] We agree with the district court that it is not. See also *Dow Chem. Co. v. Taylor*, 428 F. Supp. 86 (E.D. Mich. 1977). The district court's view has been confirmed by subsequent indications from the Supreme Court itself. *Ohio Bureau of Employment Servs. v. Hodory*, 45 U.S.L.W. 4544, 4545 n.3 (May 31, 1977); *Batterton v. Francis*, 45 U.S.L.W. 4768, 4770 n.7 (June 20, 1977).

Supporting that view is the expression by this Court in *San Diego Building Trades Council v. Garmon* that the resolution of major labor law preemption issues involves a more complicated and perceptive process which must go beyond simply "ascertaining the intent of the legislature". Further, the Court stated:

As we pointed out the other day, "the statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619, 78 S.Ct. 923, 924, 2 L.Ed.2d 1018. (359 U.S. 241)



The summary dismissal of *Kimbell*, which presented no factual record to this Court, and the conflicting views\* as to the legal effect of that disposition hardly represent "concreteness" brought about by the process of "litigating elucidation". Rather, that desirable objective can only be achieved by granting this and related petitions now pending before this Court, which present exhaustive factual records.

In response to joint petitioners' assertion of circuit conflict, respondents contend that no genuine conflict exists because every circuit that has finally decided "the question" has held that "the grant of public assistance to strikers by the States is consistent with the Supremacy Clause" (R. 11). The question presented herein concerns not "public assistance" in time of need, courtesy of the state, but state compulsion of employer assistance to its striking employees, so as specifically to adjust economic relationships in collective bargaining.

Relying on *New York Telephone*, respondents contend here and in the Court of Appeals that Congress has clearly approved such assistance. But on this decisive issue, the *Grinnell* court found no clarity, only ambiguity, thus presenting a direct conflict between the fundamental premise of each decision.

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\* The Third Circuit in *Super Tire* concluded that *Kimbell* disposed of the preemption question.

## CONCLUSION

**Certiorari should be granted in both this matter and in *New York Telephone* to resolve the important and controversial question presented and to minimize future litigation.**

Respectfully submitted,

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